IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

WESTPORT INSURANCE CORPORATION, Plaintiff, v. WILLIAM E. HOWELL, JR., WILLIAM E. HOWELL, III, Defendants, AND RICHARD MASHA d/b/a RICK'S MUSHROOM SERVICE, INC., M.A.Y. FARMS, INC., MICHAEL CUTONE, Interested Parties.	: : : : : : : : : : : : : : : : :	CIVIL ACTION NO. 05-351

NEWCOMER, S.J. May 10, 2005

MEMORANDUM AND ORDER

Presently before the Court is Defendants' Motion to Dismiss pursuant to 12(b)(1) and 12(b)(6). For the reasons set forth below, Defendants' Motion is granted. An appropriate Order follows.

I. BACKGROUND

This is a declaratory judgment action seeking a declaration as to an insurance policy for a legal malpractice claim. In September of 2001, Rick's Mushroom Service and M.A.Y., Farms, Inc. (collectively "M.A.Y.") retained the Howells to defend them against a lawsuit in federal court. On March 9, 2003, M.A.Y. terminated the Howells, alleging malpractice for the Howells' failure to appropriately respond to a motion for summary judgment and discovery requests. The Howells demanded indemnity from Westport under their legal malpractice insurance policy

("Policy"). The Policy provided a $250,000 per claim limit of liability and a $500,000 aggregate limit of liability with a $5,000 per claim deductible. On September 25, 2003, M.A.Y.'s newly retained legal counsel notified the Howells of its legal malpractice claim. On April 22, 2004, and May 6, 2004, M.A.Y.'s counsel sent two letters to Westport demanding that Westport tender its policy limit as a result of the alleged professional negligence committed by the Howells. Westport has taken the position that no coverage is afforded under the Policy.

Defendant has filed a Motion to Dismiss on the grounds that this Court lacks subject matter jurisdiction and that Westport has failed to state a claim upon which relief may be granted because the claim is not ripe for review.

II. LEGAL STANDARD

The Court must "accept as true the factual allegations in the complaint and all reasonable inferences that can be drawn therefrom" when considering a motion to dismiss. Allah v. Seiverling, 229 F.3d 220, 223 (3d Cir. 2000) (internal quotations omitted). A motion to dismiss may only be granted where the allegations fail to state any claim upon which relief may be granted. See Morse v. Lower Merion School District, 132 F.3d 902, 906 (3d Cir. 1997). The inquiry is not whether plaintiffs will ultimately prevail in a trial on the merits, but whether they should be afforded an opportunity to offer evidence in

support of their claims. See In re Rockefeller Ctr. Props., Inc. Sec. Litig., 311 F.3d 198, 215 (3d Cir. 2002).

III. DISCUSSION

Plaintiff's claim for failure to indemnify is not ripe for adjudication, and thus, is dismissed pursuant to Rule 12(b)(1). The Third Circuit has set forth a three factor test to determine the ripeness of a declaratory judgment action. It requites an analysis of (1) the adversity of the interests of the parties; (2) the conclusiveness of the judicial judgment; and (3) the practical help, or utility of that judgment. See Step-Saver Data Sys. v. Wyse Tech, Inc., 912 F.2d 643, 646-47 (3d Cir. 1990). Even though there is a considerable amount of discretion built into the Declaratory Judgment Act, the Constitution requires that declaratory judgments only be issued when there is an actual controversy. See id. at 646.

1. Adversity

The first prerequisite for a finding of ripeness in a declaratory judgment action is that "the defendant [is] so situated that the parties have adverse legal interests." Id. at 648 (quoting 10A C. WRIGHT, A. MILLER & M. KANE, FEDERAL PRACTICE AND PROCEDURE §§ 2757, 582-83 (2d ed. 1983). "Parties' interests are adverse where harm will result if the declaratory judgment is not entered." Travelers Ins. Co. v. Obusek, 72 F.3d 1148, 1154 (3d Cir. 1995) (citing Step-Saver, 912 F.2d at 647-48). To establish

that a declaratory judgment action is ripe, “the plaintiff must demonstrate that the probability of that future event occurring is real and substantial, ‘of sufficient immediacy and reality to warrant the issuance of a declaratory judgment.’” Salvation Army v. Dept. of Cmty. Affairs, 919 F.2d 183, 192 (3d Cir. 1990) (quoting Steffel v. Thompson, 415 U.S. 452, 460 (1974)). In this case, there has been no judgment or settlement on the underlying claim, and any imposition of liability is not of sufficient immediacy to warrant a declaration. Moreover, under Pennsylvania Law, “claims for indemnification arise only when the party seeking indemnity has made a payment on the underlying claim.” Invensys Inc. v. Am. Mfg. Corp., No 04-3744, 2005 U.S. Dist. LEXIS 3961 (E.D. Pa. Mar. 15, 2005) (quoting McClure v. Deerland Corp., 585 A.2d 19, 22 (Pa. Super. 1991)). No payment has been made on the underlying claim in this case. Accordingly, this Court finds that the Parties’ interests are not adverse.

2. Conclusivity

The second prerequisite to establish ripeness is that the declaration definitively decide the Parties’ rights. See NE Hub Partners, L.P. v. CNG Transmission Corp., 239 F.3d 333, 344 (3d Cir. 2001). For a declaratory judgment to be conclusive, the contest between the Parties must be based on “real and substantial controversy admitting of specific relief through a decree of a conclusive character, as distinguished from an

opinion advising what the law would be upon a hypothetical state of facts." Aetna Life Ins. Co. of Harford, Connecticut v. Haworth, 300 U.S. 227, 241 (1937). In this case, the sought-after declaration is based on the theoretical contingency that liability in the underlying claim will actually be imposed. The Court cannot make determinations as to liability at this juncture. Without a finding of liability, any declaration by this Court would amount to an advisory opinion. Therefore, the Court finds that the requested relief would not definitively decide the Parties' rights and would be inconclusive.

3. Utility

The final prerequisite for a finding of ripeness is the utility of the declaration sought, that is, "whether the parties' plans or actions are likely to be affected by a declaratory judgment." Step-Saver, 912 F.2d at 648. As stated above, the Parties' plans or actions will not be affected by a declaratory judgment because they will still have to litigate the underlying liability issue. Because a declaration will be of little practical help to the Parties, Westport's Complaint is dismissed in its entirety.

An appropriate Order follows.

S/ Clarence C. Newcomer
United States District Judge

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O R D E R

AND NOW, this 10th day of May, 2005, upon consideration of Defendants' Motion to Dismiss (Doc. 2) and Plaintiff's Response, it is hereby ORDERED that said Motion is GRANTED. Plaintiff's Complaint is DISMISSED. The Clerk of Court shall mark this case CLOSED for statistical purposes. It is further ORDERED that Plaintiff's Motion to Strike (Doc. 9) and Motion to File a Reply (Doc. 12) are DENIED as MOOT.

AND IT IS SO ORDERED.

S/ Clarence C. Newcomer
United States District Judge